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IN THE

Supreme Court of the United States

October Term, 1965

No. 717

KATHLEEN MOLNES WALSTON,
Petitioner,

v.

THELMA LAMBERTSEN,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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SUBJECT INDEX

	Page
Additional Statement of the Case	1
Argument	2
A. *Walker v. Harris* Is Not a "Fair Weather-Presumption of Unseaworthiness" Case	2
B. The Basis of the Ruling in *Walker v. Harris*	5
C. Condition of the Lifeboat in *Walker* and *Walston*	6
D. Petitioner's Other Authority	7
Conclusion	8

TABLE OF CASES

Sabine Towing Company v. Brennan, 72 F.2d 490, 1934 A.M.C. 1122 (Fifth Cir.) 8

Tropical Marine Prod. v. Birmingham Fire Ins. Co., 5 Cir. 1957, 247 F.2d 116, 1957 A.M.C. 1946 ..... 4, 5

Walker v. Harris, 335 F.2d 185 (1964), cert. den. .... U.S. ...., 85 S.Ct. 326, 13 L.Ed.2d 342 ..... 2, 4-6, 7, 8

STATUTES

Fla. Stat. Ann., Sec. 768-01	6
45 U.S.C.A., Sec. 51	6
45 U.S.C.A., Sec. 59	6
46 U.S.C.A., Sec. 688	6
46 U.S.C.A., Sec. 761	6

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ADDITIONAL STATEMENT OF THE CASE

The respondent feels that it is proper that this Court have before it certain additional facts which were provided the Court of Appeals in the respondent's brief in that Court, as follows:

One of the last witnesses to see the *Frank L III* afloat noted that she had only a few pots aboard and that she was not heeling to any extent while picking up these pots (Vol. 2, Tr. 32). The previous skipper of the boat had noted that it would not heel over while picking up crab pots and that, in fact, the line would

break before any list would be put on the vessel (Vol. 2, Tr. 54, 55). While some pots were seen aboard the vessel topside, the vessel was not fully loaded with pots and there was no way of telling how many pots were aboard (Vol. 2, Tr. 72, 76). While there was no evidence, but only an inference, that the *Frank L III* had any crabs in its live tank at all, one of the nearest boats described its own day's catch as "next to nothing" (Vol. 2, Tr. 180, 183).

The owner, Frank Lambertsen, was not present when it left the dock on the morning of the casualty (Vol. 2, Tr. 210). He did not claim or purport to know anything about crabbing or the construction of boats for that purpose (Vol. 2, Tr. 169, 209).

ARGUMENT

A. *Walker v. Harris* Is Not a "Fair Weather-Presumption of Unseaworthiness" Case

The petitioner contends that *Walker v. Harris*, 335 F.2d 185 (1964), cert. den. ..... U.S. ....., 85 S.Ct. 326, 13 L.Ed.2d 342, is in conflict with the Court of Appeals decision in the case at bar since the former applied a rule of a presumption of unseaworthiness when a vessel disappears or sinks in calm waters, whereas the latter did not do so. In the *Walker* case, *supra*, the Court only briefly referred to what it called a "familiar doctrine" arising when vessels sink in calm waters. We repeat that portion of the Court's opinion, which was also included in appellant's brief, but we add thereto the one footnote applicable to the excerpt:

"(6) This analysis brings us, therefore, to the application of the familiar doctrine, so often invoked where vessels sink in calm waters,[15] that sinking (or other failure) under circumstances and conditions which the vessel must reasonably anticipate and overcome is the best proof of, and makes out the classic case of, unseaworthiness. Although not articulated in such terms, it is a sort of sea-going *res ipsa loquitur*. Once it is assumed (or judicially held) that the vessel must anticipate the particular hazard and be staunch enough to override it, the only escape from the inference of unseaworthiness is proof that some new, unforeseen, intervening force or factor brought about the failure of ship or gear. There is none of that here."

"15. *Tropical Marine Prod. v. Birmingham Fire Ins. Co.*, 5 Cir., 1957, 247 F.2d 116, 118, nn. 3, 4, 1957 AMC 1946, collects the cases."

The case referred to in the above footnote arose in the Fifth Circuit but dealt not with a death or injury, but a hull claim under an American Institute Time Hull Policy. In considering the presumptions which arise both from the commencement of a leak while the vessel is in calm waters and any counter-presumptions which arise as to whether the loss comes within the perils covered by the policy, the Court referred to numerous cases. We have carefully reviewed each of these cases and find that they all were concerned with hull claims under marine insurance policies and the various interpretations of the latter. The Court then reviews the Adventures and Perils Clause, the provisions of a Time Policy, the problem of latent defects under a marine insurance policy, and the Inchmaree clause. To graphic-

ally demonstrate the Court's treatment of the matter as an interpretation of a marine insurance policy, we quote the following:

> "Consequently, this is not the simple case in which a loss due to unseaworthiness affords a double-barreled reason for non-payment—a defense based upon the breach of the warranty, express or implied, or as automatic proof that the loss arose from this rather than a specified peril (perils of the sea) insured against. For if the vessel really sank because the hull was unseaworthy, or by reason of the action of the sea on that unseaworthy hull, as distinguished from the action of the sea alone, this no longer automatically denies recovery. Recovery is denied now only if that unseaworthiness is one not caused or brought about by the various elements of the Inchmaree clause."
>
> *Tropical Marine Prod. v. Birmingham Fire Ins. Co.*, 5 Cir., 1957, 247 F.2d 116, 1957 AMC 1946.

Turning back to the *Walker* case, *supra*, we find, strangely enough, that the Fifth Circuit itself frowns upon any reference to marine insurance claims as a guide to the nature of the duty imposed upon a shipowner arising out of circumstances such as in the case at bar. The Court states:

> "(5) Nothing in the celebrated dicta of the *Wash Gray*, so heavily relied on by the District Court, is to the contrary. The problem in that case was not the standard of seaworthiness exacted by the law for the protection of life and limb of passengers or crew members or the care and custody and delivery of cargo entrusted to a vessel. Rather, it was whether the damage sustained by the insured vessel was caused by a peril of the sea as defined in a private insurance contract between owner and un-

> derwriters. Complicating that case, too, was the admitted insufficiency—hence, unseaworthiness—of the *Wash Gray* to go outside. Notwithstanding this, the underwriters purposefully issued the insurance with full knowledge of, and acquiescence in, the proposed voyage, and exacted a higher premium therefor. So much is wrapped up in that kind of case, the nature of the assured's warranty of seaworthiness, if any, its extent and duration in point of time, and the like, that it is not safe to conclude that losses from a 'peril of the sea' or those caused by 'unseaworthiness' are always mutually exclusive. *Saskatchewan Government Ins. Office v. Spot Pack*, 5 Cir. 1957, 242 F.2d 385, 1957 AMC 655; *Tropical Marine Prod. v. Birmingham Fire Ins. Co.*, 5 Cir., 1957, 247 F.2d 116, 1957 AMC 1946. More important, insurance cases which turn on the law's quest for the contractors' intention are *poor analogies* in assaying the 'public' duties imposed by law on ships and shipowners for the protection of people and property." (Emphasis ours)

Strangely enough, the Court cites the *Tropical Marine Products* case, *supra*, and states that it is a poor analogy, but in the following paragraph uses it in support of what it calls "sea-going *res ipsa loquitur*" in a *death* (as opposed to a hull) claim. Such "circular reasoning" is no different than that with which the Court accused the trial court in the latter's attempted definition of "reasonable fitness." See page 190.

B. The Basis of the Ruling in *Walker v. Harris*

The decision in the *Walker* case, *supra*, hinges principally not upon a finding of unseaworthiness but rather upon the presence or absence of negligence. The court so states as follows:

"(4) The question in this case boils down then to whether winds and seas of the kind actually encountered at this fateful moment were reasonably to be anticipated. On this record there cannot be any doubt."

The Court then relates the substantial and persuasive testimony by expert witnesses and the master of the tug that the "northwester" that caused the casualty was one which could have reasonably been anticipated and provided against. Such consideration can only be referable to traditional concepts of negligence and can have no relation to unseaworthiness. It is true that the Court concludes its opinion by making a finding of negligent unseaworthiness. This was only to resolve any problems as to the right to recover under the Death on the High Seas Act, 46 U.S.C.A. Sec. 761, the survival provisions of the Jones Act, 46 U.S.C.A. Sec. 688, 45 U.S.C.A. Sections 51, 59, or the local Florida Death Act, Fla. Stat. Ann. Sec. 768-01.

C. Condition of the Lifeboat in *Walker* and *Walston*

The Court in *Walker, supra,* states that there is "no difficulty presented as to the proof of unseaworthiness from the inadequate equipment of the lifeboat." While an extensive search was initially made by the Court into the necessity of the tug having a lifeboat under the applicable statutes and Coast Guard regulations, the Court concluded that with or without statutory requirement and wholly independent of Coast Guard regulations:

"• • • no vessel putting to sea in the open waters

> of the Gulf of Mexico on a voyage which will put the ship as much as 12 hours from shore in December is seaworthy unless it has at least one lifeboat suitably equipped."

The foregoing comment was a preface to the portion of the opinion stating that this was not considered to be an intrusion into the legislative domain. Factually, this is a completely different background of a vessel's activity from the one at bar. Here, the vessel inferentially was within three miles of shore. (See footnote 3 to the Court of Appeals' decision stating that there was no evidence that the vessel was beyond a marine league from the shore.) Also, the incident occurred on February 21 rather than mid-December. While the transcript does not contain a notation of the vessel's speed, it is obvious that its position within three miles of shore would have put it no greater than 30 minutes from shore rather than 12 hours, as in the *Walker* case, *supra.*

This factual difference in the location of the respective vessels as it affects the presence or absence of a lifeboat or raft logically precludes any conclusion that there is a conflict between Judge Brown of the Fifth Circuit and Judge Ely of the Ninth Circuit. Judge Ely felt that it would be mere conjecture to assume that the absence of the lifeboat contributed to the sinking of the vessel. (See Circuit Court's Opinion, footnote No. 2.) This affirmance of the decision of the Trial Court should be upheld unless *clearly* erroneous.

D. Petitioner's Other Authority

The petitioner seeks comfort in this Court's denial of

the Petition for Certiorari filed in *Sabine Towing Company v. Brennan*, 72 F.2d 490, 1934 A.M.C. 1122 (Fifth Circuit), stating that the Circuit Court in that case had applied the presumption of unseaworthiness. A careful reading of the decision, however, indicates that it became unnecessary to apply the presumption of unseaworthiness since the evidence indicates *specific* defective conditions of the vessel. The owner, in his defense, had produced evidence of extreme weather conditions at the time of the loss. The Court stated:

> "When, however, the evidence of weather conditions is considered in the light of the whole history of the tug, and of what was done to it by adding weight, and especially when it is considered that no inclining nor stability test was made on it, and the repairs and reconditioning were made without knowledge of or regard to its history of tenderness and crankiness, this weather evidence ceases to be explanatory of the loss as its cause. It becomes merely a condition of it. It serves but as a test of the equipment and preparation of the tug for the duties it must perform, and as proof that its condition as to seaworthiness was not what it ought to have been."

CONCLUSION

The petitioner contends that a conflict exists between *Walker, supra,* and *Walston.* Briefly, these two decisions hold:

(1) *Walker* case—a *finding* of specific negligent unseaworthiness of tug and lifeboat—NO NEED TO APPLY A PRESUMPTION.

(2) *Walston* case—a *finding* of *no* unseaworthiness and *no* negligence—THEREFORE A REFUSAL TO APPLY A PRESUMPTION.

In this case, the Court of Appeals has reaffirmed its definition of and guidelines for the use of the presumption. The decision in *Walker, supra,* is not inconsistent therewith since the presumption was neither needed nor applied. The latter court's comment on the presumption was therefore dicta. In essence, THERE IS NO CONFLICT.

WHEREFORE, respondent prays that the decision of the Court of Appeals for the Ninth Circuit be affirmed.

Respectfully submitted,

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